DATO' SERI ANWAR IBRAHIM A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ABU SAMAH NORDIN JCA
SULAIMAN DAUD JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: W-05-323-2009]
17 FEBRUARY 2010 C

CRIMINAL PROCEDURE: *Charge - Setting aside - Application to set aside and quash sodomy charge - Allegation that charge and prosecution was mala fide, oppressive and abuse of process of court - Allegation that no conclusive clinical findings in medical report to prove charge of sodomy* D *- Whether medical report alone is conclusive evidence - Application to set aside charge dismissed*

The appellant appealed against the decision of the learned High Court judge who dismissed his application by way of a notice of E motion to set aside and quash the charge and criminal prosecution against him under s. 377B of the Penal Code. The appellant's application was based on the following grounds: (i) that the charge and prosecution against him was made *mala fide*, oppressive and an abuse of the process of the court; (ii) the charge was a ploy for F political conspiracy and actuated by malice; and (iii) the charge was malicious as the medical report from the experts in respect of the alleged act of sodomy found that there was no conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient. The G respondent/prosecution claimed that the evidence of the offence of sodomy against the appellant was not based on the medical report alone and would be based on oral testimony, forensic evidence and other evidence. The learned judge had held that the medical report alone could not be used as a basis to set aside and quash the H charge without the court hearing oral testimony of witnesses.

Held (dismissing the appeal)
Per Abu Samah Nordin JCA delivering the judgment of the court:

I

(1) The medical report by itself was not conclusive evidence and the only evidence against the appellant. It was only corroborative in nature. The main evidence will be from the complainant

himself. The case for the prosecution would be based on oral testimony of witnesses, forensic evidence and other evidence. It was not solely based on the said medical report. (para 33)

(2) The appellant had not shown that the charge and the prosecution against him was *mala fide*, oppressive and an abuse of the process of the court. It was insufficient and it was not justified for the court to exercise its inherent power to set aside and quash the charge and prosecution against the appellant on the ground that it was *mala fide*, oppressive and an abuse of the process of the court purely on the basis of the medical report, which was merely corroborative in nature. (para 36)

Bahasa Malaysia *Translation Of Headnotes*

Perayu merayu terhadap keputusan hakim Mahkamah Tinggi kerana menolak permohonan notis usulnya untuk mengenepi dan membatalkan pertuduhan serta sabitan di bawah s. 377B Kanun Keseksaan yang dikenakan terhadapnya. Permohonan perayu diasaskan kepada alasan-alasan berikut: (i) bahawa pertuduhan dan pendakwaan terhadapnya adalah *mala fide*, bersifat menekan dan adalah suatu salahguna proses mahkamah; (ii) pertuduhan adalah satu muslihat konspirasi politik dan berasaskan dendam; dan (iii) pertuduhan berniat jahat kerana laporan perubatan berkaitan dakwaan perbuatan meliwat mendapati tiada keterangan klinikal yang konklusif bahawa telah berlaku penusukan terhadap dubur/rektum dan tiada kecederaan defensif pada tubuh pesakit. Responden/pendakwaan menghujah bahawa keterangan mengenai kesalahan liwat terhadap perayu tidak hanya didasarkan kepada laporan perubatan semata-mata, tetapi bergantung juga kepada keterangan lisan, keterangan forensic dan keterangan-keterangan lain. Yang arif hakim memutuskan bahawa laporan perubatan semata-mata tanpa mahkamah mendengar keterangan lisan saksi-saksi, tidak boleh dijadikan asas untuk mengenepikan dan membatalkan pertuduhan.

Diputuskan (menolak rayuan)

Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Laporan perubatan secara bersendirian bukan satu keterangan yang konklusif dan bukan juga satu-satunya keterangan terhadap perayu. Ia hanyalah bersifat koroboratif. Keterangan utama adalah dari pengadu sendiri. Kes pendakwaan akan disandarkan

kepada keterangan lisan saksi-saksi, keterangan forensic dan keterangan-keterangan lain. Ia tidak semata-mata berasaskan laporan perubatan.

(2) Perayu gagal menunjukkan bahawa pertuduhan serta pendakwaan terhadapnya adalah *mala fide*, bersifat menindas dan suatu salahguna proses mahkamah. Adalah tidak berjustifikasi dan tidak memadai untuk mahkamah menggunakan kuasa sedia adanya bagi mengenepikan dan membatalkan pertuduhan dan pendakwaan terhadap perayu atas alasan *mala fide*, penindasan dan salahguna proses mahkamah semata-mata dengan bersandarkan laporan perubatan, yang mana hanya bersifat koroboratif.

Case(s) referred to:

Connelly v. Director of Public Prosecutions [1964] 2 All ER 401 ***(refd)***

Datuk Hj Wasli Mohd Said v. PP and Another Case [2006] 6 CLJ 1 HC ***(refd)***

Director of Public Prosecutions v. Humphrys [1976] 2 All ER 497 ***(refd)***

EP Royappa v. State of Tamil Nadu & Anor [1974] AIR Vol 61 ***(refd)***

Hui Chi-Ming v. R [1992] AC 34 PC ***(refd)***

Karpal Singh & Anor v. Public Prosecutor [1981] 2 MLJ 544 ***(refd)***

Metropolitan Bank Ltd & Anor v. Pooley [1881-1885] All ER Rep 949 ***(refd)***

Mill v. Cooper [1967] All ER 100 ***(refd)***

PP v. Ini Abong & Ors [2009] 1 CLJ 526 HC ***(refd)***

PP v. Lee Tin Bau [1984] 1 LNS 56 ***(refd)***

R v. Attorney General's Reference (No 2 of 2000) [2001] 1 Cri App R 36 ***(refd)***

R v. Crown Court at Norwith, ex p Belsham, 94 Cri App R 382 ***(refd)***

R v. Great Yarmont Magistrates ex p Thomas, Davis and Darlington [1992] Cri LR 116 ***(refd)***

R v. Telford JJ ex p Badhan [1991] 2 WLR 866 ***(refd)***

Regina v. Chairman, Country of London Quarter Sessions, Ex Parte Downes [1956] 1 QB 1 ***(refd)***

Regina v. Horseferry Road Magistrates Court, ex parte Bennet [1993] 4 CLJ 509 ***(refd)***

Yeap Seok Pen v. Government of the State of Kelantan [1986] 1 LNS 89 PC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 178(3), 179, 180, 181, 182, 183

Penal Code, s. 377B

Specific Relief Act 1950, s. 54(e)

A Defence (General) Regulations 1939 [UK], reg. 55AB
Larceny Act 1916 [UK], s. 23(1)
Prevention of Crime Act 1953, s. 1(1)

Other source(s) referred to:
Archbold, *Criminal Pleading, Evidence and Practice*, 2007, p 358
B Archbold, *Criminal Pleading Evidence & Practice*, 2010 edn, paras 4-47, 4-54
Ratanlal & Dhirajlal, *Law of Crimes*, 26th ed, p 2135

For the appellant - Karpal Singh (Dato' Param Cumaraswamy, SN Nair & Wan Ahmad Shaddat with him); M/s SN Nair & Partners
C *For the respondent - Dato' Mohd Yusof Hj Zainal Abidin (Dato' Nordin Hassan, Wong Chiang Kiat, Norin Badaruddin & Faezah Azuna Latif with him); AG's Chambers*

[Appeal from High Court, Kuala Lumpur; Criminal Application No: 44-105-2009]
D

Reported by Amutha Suppayah

JUDGMENT

E **Abu Samah Nordin JCA:**

[1] This is an appeal by the appellant, Dato' Seri Anwar bin Ibrahim against the decision of the learned judge of the High Court, Kuala Lumpur, who, on 1 December 2009 dismissed his application by way of a notice of motion to set aside and quash the charge and
F criminal prosecution against him under s. 377B of the Penal Code and that he thereupon be discharged and acquitted accordingly. In the said notice of motion he also prayed that the criminal trial against him, *vide* MTJ3-45-9-09 be stayed or adjourned pending the hearing of his application.

G

[2] The application was supported by an affidavit affirmed by the appellant himself in which he gave three main grounds for making the application, namely,

H i) the charge and prosecution against him was made *mala fide*, oppressive and an abuse of the process of the court;

ii) the charge was a ploy for political conspiracy and actuated by malice; and

I iii) the charge was malicious as the medical report from the experts in respect of the alleged act of sodomy found that there was no conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient.

[3] The respondent (hereafter referred to as 'the prosecution') refuted all the allegations. In its affidavit-in-reply affirmed by Mohamed Hanafiah bin Haji Zakaria, a deputy public prosecutor with the Attorney-General's Chamber, the prosecution asserted that the charge against the appellant was based on the investigation by the police and in accordance with the relevant laws. It was further asserted that the evidence of the offence of sodomy against the appellant was not based on the medical report alone as the said medical report was only limited to physical examination and observation, which by itself, was not conclusive. The learned deputy prosecutor affirmed that the prosecution's case against the appellant would be based on oral testimony, forensic evidence and other evidence.

[4] Before the High Court, it was submitted on behalf of the appellant that the court has inherent power, and this was conceded by the prosecution, to stay or set aside and quash a charge which is *mala fide*, oppressive and an abusive of the process of the court. See: *Metropolitan Bank Ltd. & Anor. v. Pooley* [1881-1885] All ER Rep. 949; *Connelly v. Director of Public Prosecutions* [1964] 2 All ER 401, *Mill v. Cooper* [1967] All ER 100, *Director of Public Prosecutions v. Humphrys* [1976] 2 All ER 497, *Regina v. Horseferry Road Magistrates Court, ex parte Bennet* [1993] 4 CLJ 509, *Karpal Singh & Anor. v. Public Prosecutor* [1981] 2 MLJ 544, *Datuk Hj Wasli Mohd. Said v. PP and Another Case* [2006] 6 CLJ 1, *PP v. Ini Abong & Ors* [2009] 1 CLJ 526.

[5] The prosecution nevertheless submitted *inter alia*, that on the authority of the Supreme Court case in *Karpal Singh & Anor v. Public Prosecutor, supra,* in matters like criminal law of a purely domestic nature the court will only exercise its inherent power when there is miscarriage of justice. The prosecution also relied on s. 54(e) of the Specific Relief Act 1950 which states that an injunction cannot be granted to stay proceedings in any criminal matter.

[6] The learned judge agreed that the court has inherent power to stay or set aside and quash the charge so as to prevent abuse of its process, but the exercise of such power depends on the facts of each case. He was, however, of the view that s. 54(e) of the Specific Relief Act 1950, was not applicable as this was not an application for an injunction to stay a criminal proceeding.

[7] The learned judge, after hearing the application, perusing the medical reports and after having heard the parties, dismissed the appellant's application. He held, among others, that the medical report (exh. DSAI18) alone, could not be used as a basis for the court to exercise its inherent power to set aside and quash the charge without the court hearing oral testimony of witnesses. In arriving at his decision, the learned judge relied, *inter alia*, on:

a) Director of *Public Prosecutions v. Humphrys* where it was held that a judge has no general power to quash the charge and to decline to allow the trial to proceed where an indictment has been preferred in accordance with the law;

b) *R v. Attorney General's Reference (No. 2 of 2000)* [2001] 1 Cri. App. R 36 where Kennedy LJ in delivering the judgment of the Court of Appeal held that:

> the trial judge simply did not have the power to prevent the prosecution from calling evidence on the basis that he thought a conviction was unlikely;

c) Archbold, *Criminal Pleading, Evidence and Practice 2007* where the learned authors at p. 358, said:

> The jurisdiction to stay proceedings on the basis of abuse of process is to be exercised with greatest caution; the fact that a prosecution is ill advised or unwise is no basis for its exercise;

[8] The appellant, being dissatisfied, now appealed to this court.

[9] Before us, the learned counsel for the appellant raised only one ground in support of the appellant's contention that the charge and prosecution against him was made *mala fide*, oppressive and an abuse of the process of the court. This sole ground is based on the medical report on the complainant by the Kuala Lumpur Hospital dated 13 July 2008 (exh. DSAI18). The medical report, under the heading, summary/conclusion, states as follows:

1. No conclusive clinical findings suggestive of penetration to the anus/rectum and no significant defensive wound on the body of the patient.

2. The presence of male DNA Types from SWABS 'B5', 'B7', 'B8' and 'B9' are best interpreted with the identification of the sites of sampling;

[10] It was submitted that the word 'conclusive' means beyond reasonable doubt, in fact it was a certainty, higher than beyond reasonable doubt. The said medical report signed by three doctors, had clearly concluded that there was no conclusive clinical findings suggestive of penetration of the anus/rectum. The onus is on the prosecution to prove that there was penetration: See *Ratanlal & Dhirajlal Law of Crimes,* 26th edn. at p. 2135 which states that the court must be satisfied that penetration took place and that the penetration, however little should be proved strictly.

[11] The learned counsel for the appellant had forcefully and eloquently argued that in the face of such finding by the Kuala Lumpur Hospital, how could the prosecution proceed with the trial; it was a clear cut case of abuse, prejudice and oppression. Trial was definitely unnecessary. On the strength of the medical report alone, the learned judge ought to have held that the charge was baseless. As the learned judge had completely misdirected himself after having held that it has inherent jurisdiction to stay or set aside and quash the charge, this court has a duty, a divine duty, to intercede to see that justice is done. It cannot, under the circumstances abdicate from its duty. It does not matter that trial had not proceeded or that some black hand is behind it.

[12] A number of cases were referred to us by learned counsel for the appellant for the proposition that the court has inherent power to set aside and quash a charge which is oppressive and an abuse of the process of the court. These cases include *Connelly v. Director of Public Prosecutions, Director of Public Prosecutions v. Humphrys, Public Prosecutor v. Lee Tin Bau* [1984] 1 LNS 56, *Karpal Singh & Anor v. Public Prosecutor, Datuk Hj Wasli Mohd Said v. PP & Another Case, and PP v. Ini Abong & Other Trials.*

[13] The learned Solicitor-General II, Datuk Mohd. Yusof bin Hj. Zainal Abidin, who was the lead counsel for the prosecution conceded that the court has inherent jurisdiction to set aside and quash a charge which is oppressive and an abuse of the process of the court but submitted that such power could only be exercised in limited circumstances: See *Regina v. Chairman, Country of London Quarter Sessions, Ex Parte Downes* [1956] 1 QB 1, *Connelly v. Director of Public Prosecutions, supra, Director of Public Prosecutions v. Humphrys, supra, Karpal Singh & Anor v. Public Prosecutor, supra.*

[14] Now let us examine some of these cases. As early as 1881 Lord Blackburn in *Metropolitan Bank Ltd. v. Pooley, supra* held that the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds so as be vexatious and harassing. That was a civil case but Lord Devlin in *Connelly v. Director of Public Prosecutions* [1964] 2 All ER 401 at p. 483 was of the view that what Lord Blackburn said would also be applicable to criminal proceedings.

[15] In *Regina v. Chairman, County of London Quarter Sessions Ex Parte Downes, supra* the defendants were indicted with offences under the Iron and Steel Prices Order 1951 and Regulation 55AB of the Defence (General) Regulations 1939. Before arraignment counsel for the defendants moved to quash the indictments on the ground of insufficiency of evidence to support a conviction. The Chairman of the London Quarterly Sessions accepted the submission and quashed the indictments. The prosecutor moved for orders of *mandamus* and *certiorari.* The Court of Appeal granted the orders of *mandamus*, holding that the Quarter Sessions had no power to quash the indictments because it was anticipated that the evidence would not support the charges.

[16] Lord Goddard CJ at p. 6 said:

> Once an indictment is before the court the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or forms and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a *nolle prosequi* is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment disclosed an offence which a particular court has no jurisdiction to try.

Lord Goddard then went on to state:

> I know of no power in the court to quash an indictment because it is anticipated that the evidence will not support the charge.

[17] In *Connelly v. Director of Public Prosecutions, supra* the appellant was indicted of two charges. In the first indictment, he was charged (with three others) with the murder of H. In the second indictment he was charged (together with three others) with robbery and with aggravation contrary to s. 23(1) of the Larceny Act 1916. At the trial of the first charge for murder he raised a defence of *alibi* and

alternatively he did not have the necessary intent to murder. All four accused were found guilty of murder. The trial judge then ordered the second charge not to be proceeded with without the leave of the court or the Court of Criminal Appeal. On appeal to the Court of Appeal, his conviction was set aside on the ground of misdirection on his *alibi* defence. The court then gave leave to proceed with the second charge.

[18] At the trial of the second charge before another judge, he gave the same defence as he had advanced at the first trial, *viz*, that he had not taken part in the armed robbery, and evidence given at the first trial was given again, including an admission that he committed robbery but denying murder. He was convicted of robbery with aggravation. He appealed against this conviction on the grounds among others, that the plea of *autrefois acquit* should succeed; that the crown were estopped from proceeding with the second charge because the issue whether he took part in the robbery had been decided in his favour by the Court of Criminal Appeal and that the trial judge had a discretion to stay the second charge. The Court of Appeal dismissed his appeal.

[19] Upon reference to the House of Lords it was held that there was no abuse of process of the court in proceeding on the second indictment according to the practice prevailing at that time. Lord Reid held that the trial judge was entirely correct in declining to direct the prosecution not to proceed with the trial of the second charge. Lord Morris of Borth-y-Gest, at p. 408 was of the view that the trial judge, "had no power to suppress the prosecution. There was no abuse of the process of the court. The indictment was correct in form. There was no basis for quashing it."

[20] Lord Devlin in his judgment in that case generally agreed with Lord Goddard's proposition in *Regina v. Chairman, County of London Quarter Sessions, Ex Parte Downes* that once an indictment was before the court it must be tried except in four cases, namely, if it was defective, if the matter in bar was pleaded, if *nolle prosequi* was entered, and if the court has no jurisdiction. He however observed that it was wrong to treat it as if it were a comprehensive statement of the law for all purposes. He was of the view that, to the four exceptions given by Lord Goddard CJ there was a fifth exception, namely, "a flagrant abuse of process" or "a gross abuse of process" (p. 443). It is on this fifth exception that the appellant

herein sought to set aside and quash the charge against him as being made *mala fide* oppressive and an abuse of the process of the court.

[21] The next case is *Director of Public Prosecutions v. Humphrys*. In that case the respondent was charged of driving a motorcycle on 18 July 1972 while disqualified. He admitted driving while disqualified but denied that he was the person driving the motorcycle on that particular date. At the trial a police constable testified that he had stopped the respondent while he was driving. The respondent was however acquitted. Subsequent enquiries made by the police disclosed evidence that the respondent was in fact the driver who was stopped by the police constable. The respondent was subsequently charged with perjury in that during the course of his trial he had wilfully made a false statement, namely that he had not driven any motor vehicle in 1972. He was convicted of perjury. On appeal, the Court of Appeal quashed the respondent's conviction on the ground that the doctrine of issue estoppel applied to charges of perjury. The Crown appealed. The House of Lords held that the doctrine of issue estoppel has no application to criminal proceedings and in any event could not apply to prevent a charge of perjury against a person who had been acquitted of another offence in respect of evidence given by him at the trial for that offence. Accordingly the appeal was allowed and the respondent's conviction for perjury was restored.

[22] Viscount Dilhorne, in the course of his judgment had occasion to consider the extent of the power of the court in exercising its inherent power to quash an indictment. This is what his lordship at p. 509 said:

> Where an indictment has been properly preferred in accordance with the provisions of that Act, has a judge power to quash it and to decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognize the existence of such a degree of omnipotence is, as my noble and learned friend, Lord Edmund Davies, has said, unacceptable in any country acknowledging the rule of law.

And at p. 511 Viscount Dilhorne went on to say this:

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The function of the prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, than it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.
>
> If there is any power … to stop a prosecution on indictment *in limine* it should only be exercised in the most exceptional circumstances.

[23] Lord Salmon agreed with Viscount Dilhorne. This is what his lordship at p. 527 said:

> I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecution; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy it ought not to have been brought. It is only if the prosecution amount to an abuse of the process of the court and is oppressive and vexatious that the judge has power to intervene.

[24] A more recent case is *R v. Attorney General's Reference (No. 2 of 2000)*. In that case the defendant was charged with possession of an offensive weapon contrary to s. 1(1) of the Prevention of Crime Act 1953. He pleaded not guilty to the offence. The judge expressed firm views on the merit of proceeding with the case and encourage the prosecution to offer no evidence. The prosecution declined to withdraw. As soon as the case had been opened and before any witnesses were called the judge invited the jury to find the defendant not guilty. The jury accepted the invitation and acquitted the defendant. The Attorney General referred the case to the Court of Appeal on the following question of law:

> Whether in a prosecution which has otherwise been properly brought and where there is evidence to go before a jury, a trial judge has power to prevent the prosecution from calling evidence and direct the jury to acquit on the basis that he thinks a conviction is unlikely.

[25] The Court of Appeal held that the decision of the judge to stop the case was contrary to authority and improperly trespassed on the right of the Crown Prosecution Service to present its case in court. Kennedy LJ at p. 4 said:

> The trial judge simply did not have the power to prevent the prosecution from calling evidence on the basis that he thought a conviction was unlikely.

[26] Archbold, *Criminal Pleading Evidence & Practice,* 2010 edn at para. 4-47 states as follows:

> Once an indictment is before the court the accused must be arraigned and tried unless: (a) on a motion to quash it is held defective in substance or form; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a *nolle prosequi* is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) the indictment discloses an offence which a particular court has no jurisdiction to try: per Lord Goddard CJ in *R. v. Chairman of London Country Sessions, ex p. Downes* [1954] 1 QB 1, 37 Cr. App. R. 148 (See ante, §§ 1-190 et seq. for consideration of legitimate objections to an indictment).
>
> Where a prosecution is properly brought, a judge has no power to prevent the prosecution from presenting their evidence on the basis that he considers it unlikely there will be a conviction: *Att-Gen's Reference (No. 2 of 2000)* [2001] 1 Cr. App. R. 36, CA (and see R. v. N. Ltd, Post, § 4-292).
>
> The whole of the paragraph was approved in *R v. Plant* [2008] 2 Cr. App. R. 27, CA (at [20]).

[27] We have so far only referred to English cases but that does not mean that there is no local authority on this point. The most authoritative case is *Karpal Singh & Anor v. Public Prosecutor, supra*. In that case the applicants were charged in the Magistrate's Court in 1987 for offences under the Police Act 1967 based on a complaint made in 1984. The trials were delayed for a variety of reasons. The cases were finally fixed for hearing on 18 July 1989. At that hearing, the applicants raised a preliminary objection contending that the proceedings against them amounted to oppression and prejudice and that the court had a general and inherent power to protect its process from abuse and to strike out the proceedings. The Magistrate rejected the contention. The High Court upon revision found no merit in the applicants' contention.

Upon reference to the Supreme Court it was held that there was no provision in the Criminal Procedure Code for striking out proceeding or acquittal without hearing all the evidence the prosecution has to offer. The Supreme Court however held that the High Court may invoke such prerogative powers in rare instances where it is right to do justice to the accused.

[28] The Supreme Court at p. 549 said:

> In matters like criminal law of purely a domestic nature our view is that the court will only exercise its inherent power when there is miscarriage of justice. The court must be careful that the decision is not in conflict with the intention of the legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available …

[29] A trial before the High Court is regulated by Chapter xx, consisting of ss. 178 to 183, of the Criminal Procedure Code ("the Code"). Section 178(3) of the Code expressly provides that if the accused claims to be tried, "the court shall proceed to try the case". The prosecution shall then open its case by stating shortly the nature of the offence charged and the evidence which it proposes to prove the guilt of the accused. Next, it shall examine its witnesses, who may in turn be cross-examined by the defence, and if necessary be re-examined (s. 179). It is only after the prosecution closes its case that the court shall consider whether a *prima facie* case had been made out against the accused. If a *prima facie* case is not made out against the accused, the court shall acquit him accordingly. If a *prima facie* case is made out against him the court shall then call upon him to enter on his defence (s. 180).

[30] En. Sivarasa, learned counsel for the appellant had in his submission before the learned judge rightly conceded that there is no express provision in the Code for striking out and/or staying a charge. That was understandably the reason why the appellant sought to set aside or quash the charge and prosecution against him under the inherent powers of the court. The crux of the appellant's contention was that the charge and prosecution against him was made *mala fide* oppressive and an abuse of the process of the court.

[31] An abuse of process was defined in *Hui Chi-Ming v. R* [1992] AC 34 PC at p. 57 as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding". See also Archbold, *Criminal Pleading Evidence & Procedure,* 2010 edn at para. 4-54. The burden of establishing that the pursuit of particular proceedings would amount to an abuse of process is on the accused and the standard of proof is on the balance of probabilities: *R v. Telford JJ. exp Badhan* [1991] 2 WLR 866, *R v. Crown Court at Norwith, exp. Belsham,* 94 Cri. App. R. 382, DC.

[32] Now, in view of what had been submitted before us did the learned judge err or misdirected himself in law and in fact in dismissing the appellant's application to set aside and quash the charge and prosecution against him as being *mala fide*, oppressive and an abuse of the process of the court, based solely on the medical report by the Kuala Lumpur Hospital (exh. DSAI18)?

[33] We have carefully considered this appeal at great length. We are of the view that the authorities referred to us are against the appellant. We agree with the submission by the learned Solicitor General II that the medical report by itself is not conclusive evidence and the only evidence against the appellant. It is only corroborative in nature. The main evidence will be from the complainant himself. The learned Deputy Public Prosecutor who affirmed the affidavit in reply to the appellant's affidavit had clearly stated that the case for the prosecution would be based on oral testimony of witnesses, forensic evidence and other evidence. It was not solely based on the said medical report.

[34] In *R v. Great Yarmont Magistrates exp. Thomas, Davis and Darlington* [1992] Cri. LR 116 it was held that the burden imposed on the party alleging *mala fide* is a heavy one. Bhagwati J (with Chandrachud and Krishna Iyer JJ) in *E.P. Royappa v. State of Tamil Nadu & Anor* [1974] AIR Vol. 61 p. 555 SC at p. 586 held the same view:

> … The burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved and the very seriousness of such allegations demands proof of a high order of credibility.

[35] In *Yeap Seok Pen v. Government of the State of Kelantan* [1986] 1 LNS 89; [1986] 1 MLJ 449 at p. 453 the Privy Council held that, "He who asserts bad faith has the burden of proving it, mere suspicion is not enough". In that case the Privy Council held that the burden of establishing bad faith was at least on a *prima facie* case.

[36] In the circumstances of this case, we are of the view that the appellant had not shown that the charge and the prosecution against him was *mala fide*, oppressive and an abuse of the process of the court. It is insufficient and it is not justified for the court to exercise its inherent power to set aside and quash the charge and prosecution against the appellant on the ground that it was *mala fide*, oppressive and an abuse of the process of the court purely on the basis of the medical report, which is merely corroborative in nature.

[37] For the above reasons, the appeal by the appellant is hereby dismissed.